SUPREME COURT, U. S.

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In The

Supreme Court of The United States

OCTOBER TERM, 1968

No. 11,584

[redacted] 190

UNITED STATES OF AMERICA,

Respondent

versus

OTHELL CAMPBELL,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OTHELL CAMPBELL,

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Othell Campbell, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 20, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The judgment sought to be reviewed herein was filed on May 20, 1968. This Court's jurisdiction is invoked under 28 U. S. Code § 1254 (1), 28 U. S. Code § 1651, and 28 U. S. Code § 2106.

QUESTIONS PRESENTED

(1) Whether one in his home or only a few feet therefrom in his yard is protected by the Fourth Amendment to the United States Constitution from surveillance by government agents, without an arrest or search warrant, who are hidden on the premises in close proximity to the home.

(2) Whether observations upon which an arrest and conviction are based constitute an unlawful search and seizure in violation of the Fourth Amendment to the United States Constitution when those observations were made by trespassing government agents without a search or arrest warrant who were hidden on the premises of the accused in close proximity to his home for the purpose of observing the accused who was in a position visible only to one so hidden.

(3) Is the "open field" doctrine as applied by the appellate court below the correct basis upon which to determine whether or not an individual in connection with his home and property is entitled to the protection of the Fourth Amendment to the United States Constitution.

(4) Did the appellate Court below in its application of the "open field" doctrine apply an erroneous definition of curtilage to the facts before it.

(5) Has the "open field" doctrine set forth in *Hester v. United States* been replaced or modified by the "freedom from Government intrusion of privacy" doctrine set forth in *Katz v. United States* as the basis for making a determination of whether an individual is entitled to the protection of the Fourth Amendment to the United States Constitution.

STATUTES INVOLVED

The statute involved in this appeal is Section 5604 (a) (1), Title 26, United States Code, which is as follows:

> (1) Any person who shall transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section — Shall be fined not more than $10,000, or imprisoned not more than 5 years for each such offense.

The constitutional provision involved in this appeal in U.S.C.A. Const. Amend. 4 which is as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The defendant, Othell Campbell, was tried on a single indictment for violations of Section 5604 (a) (1), Title 26 of the United States Code. It was charged that on or about the 9th day of October, 1966, the defendant did wilfully and knowlingly possess a quantity of distilled spirits required to be stamped, the immediate containers thereof not having affixed thereto stamps as required by Chapter 51, Title 26, United States Code.

On April 19, 1967, the defendant unsuccessfully moved before the Honorable J. Robert Martin, Jr., to suppress as evidence any property seized on the night of the alleged offense at his premises by agents of the Alcohol and Tobacco Tax Division of the Internal Revenue Service of the United States, and to restrain the agents from testifying about the search and seizure.

At the hearing, defendant introduced into evidence a plat and deed proving ownership of the property, a schematic plat of the premises with definite distances indicated thereon, and photographs of the premises. Two witnesses, Arthur R. Echerd and L. J. Armstrong, testifed for the Government.

According to their testimony, at approximately 4:00 o'clock in the afternoon on the date of the alleged offense, the agents testified that the reason for their going to the premises of the defendant was based upon an accumulation of various bits of information that the defendant was handling liquor the first of the week on his premises. This testimony was objected to by the attorney for the defendant, and the objection was overruled.

The agents arrived at the premises at approximately 6:00 o'clock p.m. and stationed themselves in a cornpatch owned by the defendant and adjacent to and a part of the premises of his residence. That portion of defendant's residence and yard with which this action is concerned cannot be seen from the public roadway. Defendant's home and immediate premises are surrounded in a semi-circular fashion by a garage, a cultivated cornpatch, and a barn. There is a barbed-wire fence separating these structures and the cultivated area from an uncultivated wooded area owned by the defendant. The officers entered the premises from a paved roadway, came through a wooded area owned by the defendant, climbed over the barbed-wire fence onto defendant's cornpatch, and hid themselves at the edge of the cornpatch, approximately six to eight rows from the grassy area of the defendant's yard. There were no intervening barriers between the position of the officers and the defendant's residence.

An automobile entered the premises and the officers moved up to three or four rows from the edge of the cornpatch, at a point approximately fifty feet from defendant's house. It was dark and rainy. The driver of the automobile went into defendant's home. The defendant and another man appeared on the back screen porch, and the defendant handed the driver something. The officers could not observe the color or size of the object.

The three men then came out to the back of the automobile, which was parked in defendant's yard. The trunk lid of the automobile was opened. The defendant took a gallon jug from a cardboard carton in the trunk of the car, and the officers went to the rear of the car and arrested the defendant. The officers could not determine what was in the jug until after the arrest was made, when they opened the jug and found that it contained non-tax-paid whiskey.

The defendant was at all times in his home or only a few feet therefrom on his premises. He was at all times in a position where he could only be seen by an observer hidden on his property and on the defendant's premises in close proximity to his home.

The motion to supress made before the Hon. J. Robert Martin, Jr., was denied.

At the trial of the defendant before the Honorable Robert W. Hemphill on June 20, 1967, the same two witnesses testified for the Government. The officers again testified about information received by them prior to going to defendant's premises. An objection was made to this testimony and overruled. The witness, L. J. Armstrong, testified that when the automobile in question came into the yard of the defendant, the agents moved to the edge of defendant's yard. At the close of the testimony for the Government, the defendant renewed the motion to suppress upon the same grounds as those given before the Honorable J. Robert Mrtin, Jr., and defendant also moved for a judgment of acquittal.

All motions were denied and the petitioner was convicted and sentenced to three years imprisonment. Bond was set on appeal, and an appeal was taken in due course.

It has been conceded by the Government at all stages of the proceedings in this case that without the testimony of the agents concerning their surveillance conducted on defendant's property, there would be insufficient evidence to sustain a conviction.

The petitioner appealed to the United States Court of Appeals for the Fourth Circuit, and this appeal was decided against him on May 20, 1968.

REASONS FOR GRANTING THE WRIT

The appellate court below denied defendant the protection of the Fourth Amendment to the United States Constitution, upon the basis of a "constitutionally protected" area determination. The Court relied upon what is referred to as the "open field" doctrine.

This doctrine, developed by various federal courts, places primary emphasis upon the location or position of government agents in determining search and seizure questions. If the agents are found to be within the "curtilage" of defendant's home, a violation of the Fourth Amendment occurs. If the agents are outside the "curtilage", no violation occurs. The

appellate court below recognized that the search in question was the viewing by the government agents. Without giving any reason or basis the Court found the agents were not within the defendant's "curtilage". The Court then applied the "open field" doctrine.

Lower federal courts have based this doctrine on the general language contained in the case of *Hester v. United States*, 265 U.S. 57 (1924), that the protection of the Fourth Amendment "is not extended to the open fields". This general language has been used as the basis for the development of a mechanical doctrine whch totally disregards the fact that the Fourth Amendment protects people, not places.

The Fourth Circuit of Appeals' continued support of the "open field" doctrine and its application of that doctrine in this case is in direct conflict with this Court's holdings in the case of *Katz v. United States*, 389 U.S. 347 (1967). The language of *Katz* makes it clear that the Fourth Amendment protects people, not particular areas, and that the reach of its protection cannot be decided upon the basis of the presence or absence of an intrusion into a given enclosure. Yet, the court below based its decision entirely on the presence or absence of a physical intrusion into the "curtilage" of defendant's home.

In addition, the Court's application of the "curtilage" test to the facts of this case was so restricted as to deny the defendant or any other individual in and about his home the protection from Government intrusion guaranteed by the Fourth Amendment to the Unied States Constitution.

The Fourth Circuit Court of Appeals' determination that *Katz v. United States, supra,* does not affect the "open field" doctrine is in direct conflict with the opinion of the Ninth Circuit Court of Appeals in the case of *Wattenburg v. United States*, 388 F(2d) 853 (1968). This Circuit Court held that in the light of *Katz v. United States, supra,* the "curtilage" test was no longer the appropriate inquiry, and applied the rationale of the *Katz* case to the facts before it.

The Fourth Circuit Court of Appeals' decision sanctions the entry of government agents without an arrest or search

warrant upon private property for the admitted purpose of obtaining evidence upon which to base arrest and conviction. The only limitation imposed is that the agents must not cross into an area described as "curtilage", the bounds of which are decided case by case upon the basis of private property common law principles. The sanctity of the home and the right of privacy connected therewith is given no consideration. The continued application of the "open field" doctrine by lower federal courts requires a determination by this Court establishing the protection afforded by the Fourth Amendment to the United States Constitution to an individual in connection with his home and surrounding property and the degree of privacy one is entitled to expect in connection therewith.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,
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By: Sol E. Abrams and Thomas W. Greene
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Greenville, South Carolina

May 28, 1968.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11, 584

United States of America,

Appellee,

Versus

Othell Campbell,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Robert W. Hemphill, District Judge.

Argued March 4, 1968 Decided May 20, 1968

Before Haynsworth, Chief Judge; Craven, Circuit Judge, and MacKenzie, District Judge.

Thomas W. Greene (Sol E. Abrams, and Abrams, Bowen and Townes on brief) for Appellant, and William B. Long, Jr., Assistant United States Attorney, (Klyde Robinson, United States Attorney, and Robert O. DuPre, Assistant United States Attorney, on brief) for Appellee.

FILED: May 20 1968—Samuel W. Phillips, Clerk

Per Curiam:

Convicted of possession of illicit whiskey, Othell Campbell has appealed, complaining that his motion to suppress evidence gained from an unlawful search and seizure should have been granted. The search in question was the viewing by Alcohol and Tobacco Tax Division agents from an adjacent cornfield of a transaction in illicit whiskey which took place in the backyard of Campbell's home. The agents were not within the curtilage and the "open field" doctrine is applicable to their observations. *Hester v. United States*, 265 U.S. 57; *United States v. Shue*, 4 Cir., 385 F. 2d 416; *McDowell v. United States*, 8 Cir., 383 F. 2d 599; *Rosencranz v. United States*, 1 Cir., 356 F. 2d 310; *United States v. Hassell*, 6 Cir., 336 F. 2d 684; *United States v. Young*, 4 Cir. 322 F. 2d 443; *United States v. Potts*, 6 Cir., 297 F. 2d 68; *Hodges v. United States*, 5 Cir., 243 F. 2d 281; *Care v. United States*, 10 Cir., 231 F 2d 22; *Janney v. United States*, 4 Cir., 206 F. 2d 601. Nothing said in *Katz v. United States*, 389 U.S. 347, requires a different result.

Affirmed.

SUPREME COURT, U. S.

FILED

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OTHELL CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1968. The petition for a writ of certiorari was filed on June 13, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether observations of federal agents from petitioner's cornfield constituted an unlawful search.

STATEMENT

After a nonjury trial in the United States District Court for the District of South Carolina, petitioner

was convicted on one count charging unlawful possession of whiskey to which required tax stamps had not been affixed. 26 U.S.C. 5604(a)(1). He was sentenced to three years' imprisonment with provision for parole at such time as the Board of Parole may determine. The court of appeals affirmed (Pet. App. A).

The evidence, developed both at the trial and at a pretrial motion to suppress,[1] showed the following. At about 7:00 p.m. on October 10, 1966, A.T.T.U. Agents Echerd and Armstrong concealed themselves in a cornfield approximately fifty to seventy feet from petitioner's dwelling. They acted on information received from a proven reliable source that petitioner, who they knew had a prior record of liquor violations, was trafficking in illicit whiskey (Tr. II, 20–22). To reach their vantage point, the agents crossed petitioner's woods and climbed an old barbed-wire fence at the back edge of his cornfield (Tr. II, 36, 42; Tr. III, 16). A yard with an unpaved driveway separated the cornfield from petitioner's dwelling (Tr. II, 6–11, 38; Tr. III, 15; see Exh. C). It was dark and raining (Tr. II, 23).

Shortly after the agents had positioned themselves (about six or eight rows back in the cornfield), a black

[1] The motion to suppress was denied with an opinion by Chief Judge Martin (See Tr. I, 3–4). It was renewed at the trial before Judge Hemphill, who also denied it after making independent findings of fact and conclusions of law (Tr. I, 7–12). "Tr. I" contains the opinions of both district judges. "Tr. II" will refer to the transcript of the pre-trial motion to suppress; "Tr. III" will refer to the transcript of proceedings at trial. A copy of each is on file with the Clerk of this Court.

Chevrolet came up the driveway and parked a few feet from the edge of the cornfield (Tr. II, 23–24; see Tr. III, 11). The agents recognized the car and had information that it was being used to transport illegal liquor (T. II, 24; see Tr. III, 11). In order to see better, the agents moved forward several rows but remained in the cornfield (Tr. II, 23; see Tr. III, 16). The driver of the car got out and entered the house. After a few minutes, he came outside and stood on the back porch with petitioner and another man. The door to the kitchen was open and a light was on, enabling the agents to see what transpired (Tr. II, 17, 25; Tr. III, 11). Petitioner counted out what appeared to be money and handed it to the driver. The three men then walked to the car. They raised the trunk lid and showed a flashlight inside. The agents saw that the trunk was full of used cola syrup jugs of the type commonly used to transport bootleg liquor. Petitioner removed a gallon jug, shook it, and scrutinized it.[2] At this point the agents left their place of concealment and arrested petitioner as he was holding the jug. Twenty-two additional jugs were found in the open trunk. All contained non-taxpaid whiskey (Tr. II, 25–28; Tr. III, 11–14).

ARGUMENT

Petitioner does not dispute that the agents had probable cause, based on their prior information and current observations, to make a valid arrest of peti-

[2] The agents testified that this is commonly done to raise a "bead", or foam, on top of the whiskey, from which its proof can be estimated (Tr. II, 28, Tr. III, 14, 31).

tioner for a suspected violation of the liquor laws. Nor does he dispute that, if the arrest was lawful, seizure of the illicit whiskey was within the limits of an incidental search. He contends, however, that the testimony of the agents should have been excluded because the means by which the agents acquired probable cause—*i.e.*, through visual surveillance accomplished after a trespass onto his land—violated his Fourth Amendment rights.

The contention is without merit under traditional principles. In *Hester* v. *United States*, 265 U.S. 57, federal agents trespassed upon the field of defendant's father and from a vantage point observed him hand a bottle of whiskey to another. While holding the trespassory viewing not to be a search, the Court at the same time declared (*id.* at 59):

> [T]he special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects", is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

The lower federal courts, apparently following the lead of the Court's citation to Blackstone, thereafter developed the doctrine of the "curtilage"[3] as a means of dealing with the problem of what grounds and properties should be considered within the scope of the Fourth Amendment's protection of the house, as opposed to the "open fields" where a man was implicitly deemed to assume the risk that his conduct

[3] Blackstone, within the pages cited by the Court in *Hester*, discusses the curtilage concept.

might be subject to scrutiny. In a series of cases—some very similar to the instant case and most, as in *Hester,* involving investigations into illicit dealings in liquor—a definition was evolved, enlarging the concept of the protected home area to cover various structures, such as a barn, used in connection with the home or business, as well as other nearby, commonly enclosed locations utilized for family purposes. See, *e.g., Janney* v. *United States,* 206 F. 2d 601 (C.A. 4); *Care* v. *United States,* 231 F. 2d 22 (C.A. 10), certiorari denied, 351 U.S. 932; *United States* v. *Potts,* 297 F. 2d 68 (C.A. 6); compare *Rosencranz* v. *United States,* 356 F. 2d 310 (C.A. 1); *Wattenburg* v. *United States,* 388 F. 2d 853 (C.A. 9). It is clear, however, that a cornfield does not fall within the accepted definition of "curtilage" for Fourth Amendment purposes.

Petitioner does not contend that the agents were within the curtilage. He urges, rather, that *Hester* and the curtilage doctrine were impliedly overruled by *Katz* v. *United States,* 389 U.S. 347, and that, in the circumstances of this case, the surveillance was constitutionally invalid because the agents lacked a search warrant.[4] Compare the claim in *Cothren* v.

[4] In so arguing, petitioner relies on some observations in *Wattenburg* v. *United States, supra,* which support his position. However, *Wattenburg* involved an actual search of property, not a viewing, by agents who intruded into the curtilage surrounding the defendant's motel residence. The court, before announcing (in light of *Katz*) that it believed the more appropriate test should henceforth be whether a search "constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is acces-

United States, No. 965, O.T. 1967, certiorari denied, 390 U.S. 949, and *Grimes* v. *United States,* 391 F. 2d 709 (C.A. 5), petition for certiorari pending (No. 93, this Term). It seems evident, however, that *Katz* was not intended to disturb the established law concerning the admissibility of *visual* observations by law enforcement agents and, in any event, that the principles announced in *Katz* are consistent with *Hester* and the curtilage rule. See *Katz, supra,* 389 U.S. at 360–361 (Harlan, J., concurring).

Katz imposed a constitutional requirement of a warrant as a precondition to the use of *electronic equipment* by law enforcement officers to overhear a conversation absent the consent of either party thereto, where, in addition, the words were not uttered so as to be "knowingly expose[d] to the public". *Katz, supra,* 389 U.S. at 351. The opinion gives no indication that it was meant to apply to non-electronic surveillance, such as that in *Hester,* which poses a far less pervasive and significant threat to privacy than is presented by electronic overhearing. Petitioner's argument that *Katz* applies to purely visual surveillance would require an interpretation of that case as making substantial inroads upon the old doctrine, upon which *Hester* and many recent decisions of this Court have been based,[5] that use of the eye to

sible to the public", 388 F. 2d at 857, expressly held that the search there was unlawful, under traditional principles, as involving a trespass into the curtilage. *Ibid.* There is thus no conflict, as alleged by petitioner, between *Wattenburg* and the present case.

[5] *E.g., Rios* v. *United States,* 364 U.S. 253; *Ker* v. *California,* 374 U.S. 23, 43; *Harris* v. *United States,* 390 U.S. 234.

view is not a "search" within the meaning of the Fourth Amendment. Far from so holding, *Katz,* as we read it, supports that rule and, indeed, supplies it with an additional rationale—that what is seen by an officer with his own eyes has most often been knowingly exposed to the public by its doer or possessor. This interpretation of *Katz* is buttressed by the Court's citation of *United States* v. *Lee,* 274 U.S. 559, at 563, for the proposition that what "a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection". *Katz, supra,* at 351. *Lee* involved the viewing of cases of liquor on board a vessel at night with the aid of a searchlight from a pursuing ship. The use of binoculars also has been deemed permissible and not to transform a viewing into a "search". *Lee, ibid.* (dictum); *Hodges* v. *United States,* 243 F. 2d 281 (C.A. 5). The present case concerns the *a fortiori* situation of a viewing with the unaided eye.

Of course, if the viewing with the naked eye is the result of a violation of a Fourth Amendment right, the testimony would still be inadmissible. If, for example, an agent unlawfully secreted himself in a closet in a house, he could not testify to what he saw or heard. The protection afforded by the Fourth Amendment to persons in their "houses, papers, and effects" clearly applies to preserve the rights of individuals against law enforcement agents who trespass without warrant upon the privacy and sanctuary of the home itself, or its appurtenant buildings or land. This, however, is simply to recognize the wisdom of the accommodation which *Hester* and other cases long

ago decreed with respect to surveillances by sight. *Hester,* as amplified by the curtilage doctrine, continues to reflect a fair delineation of the rights safeguarded by the Fourth Amendment with regard to the problem of visual surveillance. Nothing in *Katz* suggests the contrary. In fact, the surveillance here was proper under the very principles which this Court articulated in *Katz.*

Petitioner, who chose to conduct his illegal activities out of doors and in the luminosity of lights under his, or his confederates', control, should not be heard to complain that federal agents, whom he should reasonably have expected to be attempting to uncover evidence of his bootlegging activities, were able to observe what transpired. In these circumstances, it would be stretching reality to hold that petitioner "[sought] to preserve as private" his actions against the risk of revelation to law enforcement officers using only the faculty of sight. See *Katz* v. *United States,* 389 U.S. 347, 351. By acting outside the home or any other enclosure (compare *Katz*), petitioner exposed his conduct to the public and assumed the risk of visual surveillance by persons situated outside the curtilage. The judgment below was thus correct.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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In its brief the Government states that petitioner does not contend that the agents were within the curtilage of petitioner's home. This statement is erroneous.

Before the Fourth Circuit Court of Appeals the petitioner took the position that the activities of the Government agents were in violation of petitioner's Fourth Amendment rights under both the rationale of *Katz v. United States*, 389 U.S. 347 (1967) and under the old theory of curtilage as developed by various federal courts since the decision in *Hester v. United States*, 265 U.S. 57 (1924).

This same position is now taken before this Court. In petitioner's Petition for a writ of certiorari, page 2, Questions Presented No. 4, petitioner states the following question: "Did the appellate court below in its application of the 'open field' doctrine apply an erroneous definition of curtilage to the facts

before it?" At Page 6, Reasons For Granting The Writ, petitioner states that the Court's application of the "curtilage" test to the facts before it was so restricted as to deny an individual in and about his home the protection of the Fourth Amendment.

Questions 1 and 2, on Page 2, of the petition, each raises the issue as to whether the concept of curtilage was properly applied under the facts of this case.

Question 1 included the query of whether the Fourth Amendment protected an individual "from surveillance by agents without an arrest or search warrant when the agents *were hidden on the premises in close proximity to the home.*"

Question 2 included the query of whether one is entitled to the protection of the Fourth Amendment when "observations were made by *trespassing* government agents without a search or arrest warrant who were *hidden on the premises of the accused* in close proximity to his home for the purpose of observing the *accused who was in a position visible only to one so hidden.*"

These two questions clearly raise the issue as to whether the Hester Doctrine was properly applied in the instant case, if the Doctrine is still a valid one.

By the above, petitioner did raise and intends to raise the question of the correctness of the lower Court's holding that the agents were not within the petitioner's curtilage.

The officers observing the petitioner were at the edge of his grassy yard in a cultivated cornpatch, not more than 50 feet away from petitioner's residence. There were no intervening barriers between the agents and petitioner's residence. The portion of the petitioner's residence under observation is not visible from the roadway or from the property of others, and is partially surrounded in a semicircular fashion by a garage, a barn, and a fence which runs through the cornfield. It was this fence the agents crossed in getting to their position of observation. The yard adjacent to petitioner's residence, the garage, the barn and the cultivated cornfield constitute an integral part of the petitioner's "farm economy". The petitioner could not have been observed by the agents from the property

of any other person, and could be observed only from a very limited area in the immediate vicinity of his home.

It is, therefore, submitted that the officers during their surveillance were within the petitioner's curtilage.

If the "curtilage" test is still the proper basis upon which to determine petitioner's Fourth Amendment rights, it is petitioner's position that the lower Court's decision is based upon an incorrect interpretation of *Hester v. United States,* 265 U.S. 57 (1924) in that it grants the protection of the Fourth Amendment only to one in a building. The decision below also fails to consider the substantial difference between the facts in *Hester v. United States* (open unprotected area around a home) and the facts of this case which place petitioner in and about his home in the center of protective surroundings.

For these reasons, and the reasons set forth in petitioner's petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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July 17, 1968.